

JOE SAVAL CO.
v.
BUREAU OF LAND MANAGEMENT
STATE OF NEVADA, DEPARTMENT OF WILDLIFE,
INTERVENOR

IBLA 89-345

Decided May 7, 1991

Appeals from a decision of Administrative Law Judge Ramon M. Child setting aside a decision by the District Manager, Battle Mountain District, Nevada, Bureau of Land Management, granting a sheep grazing application, subject to certain restrictions. Nevada 6-87-16.

Reversed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Grazing Permits and Licenses: Generally--Taylor Grazing Act

A decision by BLM to grant a sheep grazing application subject to restrictions in order to facilitate multiple-use management objectives by keeping a portion of an allotment off limits to domestic sheep so that it might be available for the introduction of bighorn sheep, will not be disturbed absent substantial evidence showing that the decision is improper.

APPEARANCES: William F. Schroeder, Esq., Vale, Oregon, for Joe Saval Company; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Brian Chally, Esq., Office of the Attorney General, Carson City, Nevada, for the State of Nevada, Department of Wildlife.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Bureau of Land Management (BLM) and the State of Nevada, Department of Wildlife (NDOW), have appealed from a March 2, 1989, decision of Administrative Law Judge Ramon M. Child, setting aside a June 26, 1987, decision of the District Manager, Battle Mountain District, Nevada, BLM. The District Manager's decision had approved the application of the Joe Saval Company (Saval) to graze 175 sheep within the Buffalo Valley Allotment, but excluded grazing in the vicinity of Buffalo Ranch and the east side of Mt. Tobin on the basis that such use in those areas was in potential conflict with bighorn sheep.

In its grazing application, Saval had applied to graze 175 sheep "unherded in the vicinity of Buffalo Ranch and east side of Mt. Tobin." In a September 24, 1986, letter to the District Manager, Saval had expressed its opinion that the South Buffalo Allotment would be ideal for sheep operations. Noting that the base property and attached grazing privileges were then granted for cattle operations, Saval requested BLM to allow conversion of part of its use for sheep grazing (Exhs. R-5, A-15).

On June 26, 1987, BLM's District Manager, Battle Mountain District, approved the application for grazing 175 sheep in the South Buffalo Allotment "within the area designated as not in potential conflict with bighorn sheep." (Emphasis in original.) The decision explained at page 2:

The land use plan for the Sonoma-Gerlach Resource Area, Winnemucca District Office, BLM, has identified reasonable numbers of bighorn sheep for the South Buffalo Allotment and designated it as an area for potential reintroduction of bighorn. The land use plan for the Sonoma-Gerlach Resource Area allows for conversions from cattle to sheep except on those allotments or portions of allotments where conflicts with existing bighorn sheep (or imminent reintroductions) cannot be mitigated. Therefore, any conversion from cattle to sheep in the area of potential conflict will depend upon completion of the Bureau's environmental assessment procedure including reaching agreement on mitigation measures. It would be premature to approve domestic sheep use within the potential conflict area until a decision has been made whether or not to allow a conversion.

On September 12, 1988, the Area Manager, Shoshone-Eureka and Sonoma-Gerlach Resource Areas, issued an environmental assessment (EA) considering the potential conflict between domestic and bighorn sheep in the western portion of the South Buffalo Allotment, in light of Saval's request to convert its grazing preference in that area from cattle to sheep (Exh. R-11). In support of that request, Saval had suggested four mitigating measures: (1) a health program including vaccination and disease control; (2) a 1-mile buffer zone; (3) sheep-proofing the western allotment boundary by fence construction; and (4) site management practices to provide higher quality water while reducing breeding areas for some insects and disease-causing organisms. Saval also offered to reimburse NDOW for bighorn deaths proven to be caused by the presence of their domestic sheep and to give up use in the Stillwater Range in return for use in the Tobins (Exh. R-11 at 3).

The EA states that under the Sonoma-Gerlach Management Framework Plan III (MFP), the entire Tobin Range and a portion of the Stillwater Range within the Buffalo Valley Allotment 1/ are identified as habitat for bighorn

1/ The Draft Sonoma-Gerlach Grazing Environmental Impact Statement (Exh. R-18) contains a map depicting the grazing allotments in the Sonoma-Gerlach Resource Area. The map depicts a "South Buffalo and a North Buffalo Allotment." The correct reference to the allotment at issue here is the South Buffalo Allotment.

sheep, that in 1984 NDOW introduced 34 bighorn sheep on the west side of the Tobin Range, and that in 1987, NDOW postponed introducing bighorn sheep in the South Buffalo Allotment, pending resolution of this appeal (Exh. R-11 at 4). After analyzing the available data, the Area Manager concluded that the grazing preference in the western portion of the allotment should not be converted from cattle to sheep. Her decision was based on research indicating that declines and die-offs in bighorn sheep populations were aggravated by disease transmissions from domestic to bighorn sheep when the populations mingled. 1/ Her concluding rationale states as follows:

Intentions of the Winnemucca District BLM and NDOW are to assure a viable, healthy population of bighorn sheep in the Tobin Range * * *. [I]dentified potential [bighorn] habitat and one imminent reintroduction lie within the allotment and the existing population is immediately adjacent to the allotment. Therefore, the action does carry the risk of contact between domestic and bighorn sheep with potential for disease transmission and the risk of competition for food, space, and water.

(Exh. R-11 at 6). The Area Manager then rejected the mitigating measures suggested by Saval:

The management actions offered as mitigation by the Joe Saval Company do not offset the risks. A health program has not been proven, at this time, to effectively prevent disease transmission between the species. Evidence suggests that a health program could not be effective for the pneumophilic bacteria frequently associated with declines of bighorn populations. The buffer zone, as described, lies within the identified bighorn habitat and puts the augmentation site planned for 1987 within the area of domestic sheep use, allowing complete overlap of the two species in that area. Sheep proofing the western allotment boundary could restrict expansion of the existing population of sheep, interfere with movements of the wild horses, and still allow contact between bighorn and domestic sheep since it lies immediately adjacent to the current range of the existing population of bighorns and within the potential habitat. The site management mitigation appears to have a minimal impact, unless it was part of a much larger program of acceptable mitigation measures. Acceptance of reimbursement and/or trade-off of no dispute over the [S]tillwaters in place of bighorn in both ranges do not comply with the MFP III.

(Exh. R-11 at 6-7).

2/ Attached to Exhibit R-11 as Appendix II is a paper by Nike J. Goodson entitled Effects of Domestic Sheep On Bighorn Sheep Populations: A Review. The thrust of the paper is the incompatibility of domestic and bighorn sheep on shared ranges. The author reached the conclusions, inter alia, that bighorn resistance to disease may be lowered due to stress caused by

An evidentiary hearing was held before Administrative Law Judge Ramon A. Child at Elko, Nevada, on September 13 and 14, 1988.

BLM's District Manager, Terry L. Plummer, testified that the application to graze sheep was denied in part on the potential conflict between domestic sheep and big horn sheep (I Tr. 62-63). He explained a "potential conflict" as the possibility of disease transmission between domestic and bighorn sheep (I Tr. 151-52). Plummer testified that the authorization for livestock grazing must be consistent with BLM's MFP, and that the decision being appealed was taken in reliance on the Sonoma-Gerlach MFP (I Tr. 64, 108-09, 119-20).

Three MFP documents were introduced at the hearing. Exhibit R-6, states that NDOW and BLM "cooperatively worked out procedures for establishing reasonable numbers and forage requirements for big game animals" and that "[r]easonable numbers for bighorn sheep represent estimates of numbers that the potential habitat in the use areas would support once reintroductions [of bighorn sheep] are made." Exhibit R-8 (Sonoma-Gerlach MFP III) recommends conversion from cattle to sheep on all resource area allotments or portions of allotments except those "where conflicts with existing bighorn sheep (or imminent reintroductions) cannot be mitigated." One of the long-range multiple use allotment management objectives foreseen for the South Buffalo Allotment was to provide habitat for reasonable numbers of wildlife including 135 animal unit months for 56 bighorn sheep (Exh. R-7; I Tr. 110).

George Tsukamoto, a wildlife biologist and chief of NDOW's wildlife management program, testified that the Tobin Range had been studied by NDOW and found to be an excellent area for bighorn sheep introduction (I Tr. 216; Exh. I-21). He stated that a transplant of bighorn sheep to the Tobin Range had occurred in 1984, and that in 1986, NDOW approached BLM concerning a further introduction of bighorn sheep to the area (I Tr. 221-22; Exh. I-22). He stated that bighorn sheep would be adversely affected if domestic sheep grazing were allowed to the extent sought by Saval (I Tr. 222). He explained that it was NDOW's policy not to introduce bighorn sheep into any allotment occupied by domestic sheep because of the possibility of disease transmission (I Tr. 227-28).

David A. Jessup, a veterinarian for the California Department of Fish and Game, testified that he had investigated two major die-offs of bighorn sheep in Nevada, both of which occurred after domestic sheep came into contact with bighorn sheep (II Tr. 288). He stated that of the variety of diseases that may be shared by domestic and bighorn sheep, the "pasteurella pneumonia process is the most important single disease process that we believe occurring between domestic sheep and bighorn sheep," and that bighorn sheep usually die of this disease (II Tr. 302, 308). Jessup's research

fn. 2 (continued)

the presence of domestic sheep, and that in addition to pasteurella (a type of pneumonia), domestic sheep may carry a number of other diseases which can cause increases in the mortality of the bighorn.

and investigations led him to conclude that the evidence regarding transmission of pasteurella from domestic to bighorn sheep was such as would require him to counsel that contact between the two species should be avoided (II Tr. 306-07). ^{3/}

Marie S. Bulgin, veterinarian and sheep specialist at the University of Idaho, testified that contact between domestic and bighorn sheep does not necessarily impair the health of the bighorn sheep (II Tr. 484). However, Bulgin did not claim to be a wildlife specialist and her opinion was based on her interpretation of research reported in an article coauthored by Jessup (Exh. I-26, note 2, supra; II Tr. 464-82), not on her own investigations.

Bobby Rand Hillman, veterinarian with the Idaho Bureau of Animal Health, testified that he was involved in developing health programs for wildlife species including bighorn sheep (II Tr. 497). Hillman stated that contact between domestic and bighorn sheep did not necessarily impair the health of the bighorn sheep, but that disease could be transmitted from domestic to bighorn sheep (II Tr. 513, 515).

In his decision, Judge Child concluded essentially that BLM erred in reserving a portion of the allotment for reintroduction of bighorn sheep, and that the District Manager's limitation of Saval's sheep grazing application was arbitrary and capricious. As noted earlier, the District Manager's June 26, 1987, decision relied on the MFP which allows for conversions from cattle to sheep except on those allotments or portions of allotments where conflicts with existing bighorn sheep (or imminent reintroductions) cannot be mitigated. At page 8 of his decision, Judge Child states: "It is clear from the relevant [MFP] that bighorn sheep cannot

^{3/} Introduced as Exhibit I-26 was an April 1982, article coauthored by Jessup, entitled Fatal Pneumonia of Bighorn Sheep Following Association with Domestic Sheep. In that article, the authors concluded that "circumstantial evidence indicated that the apparently healthy domestic sheep transmitted pathogenic bacteria to the bighorns, resulting in mortality," and that "[t]he presence of domestic sheep may have been an important stress which initiated or compounded the disease." The abstract to another article by Jessup, Diseases of Domestic Livestock which threaten Bighorn Sheep Populations, states as follows:

"Bighorn sheep (Ovis canidensis) are susceptible to a number of livestock diseases and parasites. Historical records and modern investigations of bighorn disease problems and die offs reveal numerous examples. Some common diseases of domestic sheep, scabies, chronic frontal sinusitis, internal nematode parasites, pneumophilic bacteria (especially Pasteurella sp.), footrot, parainfluenza III, bluetongue and soremouth are cited and reviewed. Cattle may host some of these diseases, and may also be a source of paratuberculosis, pink eye, and respiratory syncytial virus. The complexity and seriousness of potential disease interactions between domestic livestock and bighorn are emphasized. Resource decision makers must carefully weigh this potentially negative interaction."

be introduced on an allotment where sheep graze * * * unless all conflicts can be resolved." (Emphasis in original). Focussing on the fact that Saval has private holdings within the western portion of the South Buffalo Allotment, Judge Child reasoned that "all conflicts" could not be resolved "without * * * a condemnation proceeding to eliminate appellants' and all private holdings on the potential bighorn sheep habitat on the Tobin Range where that habitat touches allotments wherein active sheep preferences exist" (Decision at 8). Judge Child set aside the District Manager's decision as being contrary to the MFP, and directed BLM to grant Saval's application without restriction. 4/

The portion of the MFP relied on by Judge Child states that "[b]ighorn sheep will not be reintroduced on active preference sheep allotments unless all conflicts can be resolved." This appeal, however, involves conversion of an allotment to sheep use, and not an active preference sheep allotment (Exh. R-6 at 6 (unpaginated), emphasis supplied). The District Manager's June 29, 1987, decision states that in 1978, Saval's sheep use shifted from active preference to exchange-of-use, and that as of 1978, all active preference held by Saval "has been cattle use." Thus, under the MFP, and in the case of an allotment under conversion to sheep use, the pertinent inquiry was whether conflicts could be mitigated, not whether they could be resolved. It follows that the District Manager's decision was in conformance with the MFP in this respect.

BLM contends that Judge Child's decision is unsupported by the record, asserting that the District Manager's decision limiting sheep grazing in favor of a potential reintroduction of bighorn was compelled by the MFP which requires the avoidance of potential conflicts between domestic and bighorn sheep.

Saval contends that no conflict will result if the whole of the allotment is permitted for domestic sheep grazing. Saval asserts that the District Manager's decision erroneously denies its grazing rights within a portion of the allotment.

Saval's grazing permit (Exh. R-3) was issued pursuant to section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1988). It is well established that implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1988), is committed to the discretion of the Secretary of the Interior. Charles Blackburn, 80 IBLA 42 (1984); Claridge v. Bureau of Land Management, 71 IBLA 46 (1983). Section 2 of the Taylor Grazing Act specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide

4/ By order of Aug. 7, 1989, the Board denied Saval's motions to dismiss the appeal of NDOW and to place Judge Child's decision into full force and effect.

for the orderly use, improvement and development of the range." 43 U.S.C. § 315a (1988). The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1751-1753 (1988), amended the Taylor Grazing Act and reiterated the Federal commitments to the protection and improvement of Federal range lands. Nothing in the Taylor Grazing Act or FLPMA mandates, that in terms of BLM management of the public rangeland, livestock must take preference over wildlife. Blackburn, supra at 48.

Under 43 CFR 4100.0-8, the authorized officer is required to "manage livestock grazing on public lands under the principle of multiple use and sustained yield and in conformance with applicable land use plans." The term "multiple use" is defined in FLPMA as the management of the public lands and their various resource values "in the combination that will best meet the present and future needs of the American people" taking into account "long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife, and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c) (1988).

An adjudication of grazing privileges will not be set aside on appeal if the decision is found to be reasonable and substantially complies with the applicable statutes and Departmental grazing regulations. Raymond C. Auge v. Bureau of Land Management, 76 IBLA 83 (1983). A determination by a District Manager will not be overturned in the absence of a clear showing of error. Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (1987); Chris Claridge v. Bureau of Land Management, supra. The burden is on the appellant to show by substantial evidence that a decision is improper or unreasonable. Ruskin Lines, Jr. v. Bureau of Land Management, 66 IBLA 109 (1982).

The issue is whether BLM's determination limiting Saval's sheep grazing application was rendered in harmony with the above authorities. We hold that it was and that Judge Child's decision must be reversed.

[1] The BLM action here appealed is set forth in the District Manager's June 26, 1987, decision and in the Area Manager's September 12, 1988, EA analyzing the potential consequences of contact between domestic and bighorn sheep in the western portion of the South Buffalo Allotment. BLM's action was based on the policy set forth in its MFP. The ultimate rationale for BLM's determination is found in the first paragraph of the excerpt from the EA, quoted supra, where the Area Manager concluded that contact between domestic and bighorn sheep should be avoided because of the potential for disease transmission and the risk of competition for food, space, and water. A preponderance of documentary and oral evidence supports the wisdom of this conclusion. 5/ No significant challenges, in

5/ In the EA, the Area Manager rejected the "proposed action" (conversion of the western third of the allotment from cattle to sheep) based on the finding that that action could not be adequately mitigated to allow for bighorn sheep within the area as provided in the MFP. As noted earlier,

terms of contrary scientific findings, were put forward to impugn the conclusions of the Goodson paper and the Jessup articles. At the hearing, the thrust of the Saval evidence on conflict between the two species was to review and critique, not contradict, the evidence presented by BLM and NDOW. The record fully supports the action taken by BLM and Saval has failed to meet its burden of proving otherwise, or of showing that its grazing rights have been injured. Therefore, in the grazing application under appeal, BLM properly restricted the western third of the allotment in the interest of the potential reintroduction of bighorn sheep.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

fn. 5 (continued)

the Area Manager reached this conclusion after considering the mitigating measures suggested by Saval. On appeal, Saval has offered nothing to cast doubt on the soundness of the area manager's determination as reflected in the EA.

